IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 72-6476

CYNTHIA HAGANS, for herself and her two infant children, KIMBERLY and KOREY; BERTHA GRISSETT, for herself and her five infant children, DEBORAH, ANGELO, WILLIAM, LINDA and CYNTHIA; KATHRYN ZAVERZENCE, for herself and her infant child, DANA LYNN; KOREN HORNECK, for herself and her infant child, TODD, and her intrauterine child yet unnamed; EURLEEN CARSON, for herself and her two infant children, TIMOTHY and CALVIN; BARBARA SIEMILLER, ELIZABETH ELY and BARBARA LYNCH, as individuals and on behalf of all other persons similarly situated,

Petitioners,

v.

ABE LAVINE, as Commissioner of the New York State Department of Social Services, and JAMES M. SHUART, as Commissioner of the Nassau County Department of Social Services,

Respondents.

REPLY BRIEF OF PETITIONERS

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POINT I

THE CONSTITUTIONAL CLAIMS PLEADED IN THE COMPLAINT ARE SUBSTANTIAL AND ARE SUFFICIENT TO ESTABLISH JURISDICTION UNDER 28 U.S.C. §1343(3).

The respondent attempts to denigrate the merit of the equal protection challenge by erroneously asserting, "(p)etitioners are demanding to be treated better than

similarly treated recipients. They cannot claim a denial of equal protection because the respondents desire to treat them the same as others so situated." (Brief for Respondent at 20). Such paralogy fails to obscure the substantiality of the constitutional claim, for under the recoupment regulation everyone is not treated equally. Petitioners do argue that the recoupment regulation is violative of the equal protection strictures because it irrationally creates two classes of needy, dependent children receiving benefits under the State's Aid to Dependent Children (AFDC) program. Children whose parents required an emergency rent disbursal to forestall an eviction or secure housing are deprived of their right to have their eligibility for financial assistance determined in accordance with federally-imposed requirements by means of invidious discrimination and as a consequence are deprived of the state-determined level of assistance provided to all other needy children for as long as six months.

The practical effect of the recoupment regulation is not equality of treatment, but the punishment of needy children by depriving them of a substantial portion of AFDC assistance which they are eligible to receive because their parent has required an emergency rent disbursement in a prior month which is no longer available to meet the child's needs. While the State, no doubt, has a legitimate legislative purpose in deterring mismanagement, and while equality of treatment is rationally related to that purpose, the means chosen by the State are inconsistent with the Equal Protection Clause. The regulation does not advance the legislative objective in a manner consistent with the command of the Equal Protection Clause. *Reed v. Reed*, 404 U.S. 71, 76 (1971). The regulation is thus not the exemplar of

equal treatment, but rather of invidious discrimination and irrationality.

The rationality proffered by the State in support of the classification must necessarily be assessed in light of the purpose and intent of the Social Security Act. The Act represents a Congressional determination of the content of the Equal Protection Clause with respect to implementing state legislation. The public assistance programs under the Social Security Act were enacted to provide financial aid for unmet subsistence needs after other income and resources have been taken into account. While New York might contend that it is not required by the Act to make emergency rent disbursals, it is incontestable that if it elects to do so it must abide by the federal requirements governing determination of the availability of income and determination of need on an objective and equitable basis.

While it has been argued that the recoupment regulation is designed to deter mismanagement, it is clear that the regulation does not turn on mismanagement. Recoupment is mandated whenever an emergency rent disbursal is made to forestall an eviction. The court below recognized that recipients are threatened with eviction for a variety of reasons, often without regard to fault. (A-115). The State attempts to defend the regulation from the equal protection challenge by contending that it is designed to deter mismanagement since all petitioners "are in the position of having misallocated money given to them to pay rent." (Respondent's Brief at 19). And yet, in response to the due process claim, the State argues that "recoupment is not limited to proven cases of mismanagement. . . ." (Respondent's Brief at 14, fn. 9). Moreover, it strains rationality to pretend as the State does, that the problem of mismanagement can be solved

by depriving destitute families of the means to feed, clothe and shelter themselves during the period of recoupment.

The recoupment regulation represents the "very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment." *Reed v. Reed, supra* at 76. New York does not even treat all who it claims have misallocated their shelter allowances and who receive emergency rent disbursals equally. The State is in the anomalous position of defending the recoupment regulation on the grounds that it is a rational means to deter mismanagement and it "encourages proper money management," (Respondent's Brief at 23), while at the same time exempting from the reach of the recoupment regulation those recipients who mismanage shelter allowances, are evicted from their housing and are rehoused in motels and hotels at additional expense. Thus, recipients who have clearly mismanaged receive their basic needs in full and suffer neither recoupment nor reimbursement. (A-63). On the other hand, petitioners, often for circumstances beyond their control and unrelated to mismanagement, receive an emergency rent disbursal, but under the challenged regulation are compelled to suffer the devastating consequences of recoupment for as long as six months. Another class exempt from the impact of recoupment are recipients who receive emergency rent disbursals pursuant to the provisions of New York Social Services Law §350-j as emergency assistance to avoid destitution. Yet respondent continues to contend that such disparate treatment is "incontestably reasonable". (Brief for Respondent at 20).

Respondent also seeks to impugn the actuality of the due process claim which plainly appears on the face of the complaint. (A-14). It is well settled by the decision of

this Court that "(t)he existence of a substantial question must be determined by the allegations of the bill of the complaint." *Ex parte Poresky*, 290 U.S. 30, 32 (1933).[1] The due process claim is, and has always been in this case although not specifically raised in the petition for certiorari. The Court's rules and practice provide that the statement of a question presented "will be deemed to include every subsidiary question fairly comprised therein." (See Supreme Court Rules 23(1)(c)). The concepts of equal protection and due process are overlapping ones as this Court has often recognized. (See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971)). While the Court will not generally consider questions unless presented in the petition for certiorari, "the court, at its option, may notice a plain error not presented." Supreme Court Rules

[1] The failure of the intervenors to plead the due process claim does not constitute an abandonment of the claim since it is Hornbook law that intervention is ancillary to the principal action. The intervenors entry into the action was on the remand after both the district court and circuit court had found federal jurisdiction to determine the issues presented, therefore they were not required to plead grounds of jurisdiction to support their claim. See Fed. R. Civ. P. 8(a)(1). There is no requirement that the pleadings state particular facts, evidence or law. All that is required is a "short and plain statement of the claim showing that the pleader is entitled to relief. . . ." Fed. R. Civ. P. 8(a)(2). The Federal Rules have done away with the narrow "theory of the pleadings" doctrine which had required a pleader to state a definite theory of his case. See J. Moores *Manual, Federal Practice and Procedure*, Vol. 1, §10.04(2). A persuasive analogy is to be found in *Rosado v. Wyman*, 397 U.S. 397, 405 (1970), where the Court rejected a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim. In *Rosado* the Court held that mootness of the equal protection claim did not divest the district court of jurisdiction to determine the pendent claim that certain provisions of the New York Welfare Law were incompatible with the federal Social Security Act.

40(1)(d)(2). To avoid reaching broad constitutional issues presented by the petition, the Court has often disposed of cases by deciding questions not presented by the petition. *Boynton v. Commonwealth of Virginia*, 364 U.S. 454, 457 (1960); *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 412 (1947). Moreover, since the due process claim presents an alternative basis for upholding federal question jurisdiction, is plainly set forth on the face of the complaint and raises "only issues of law not calling for examination or appraisal of evidence," *Kiefer-Stewart Co. v. Joseph H. Seagram & Sons*, 340 U.S. 211, 214 (1951), it would be appropriate for the Court to consider it since it is dispositive of the threshold question of jurisdiction and would thus make it unnecessary to consider more far reaching questions.

Respondent's reliance upon *Dandridge v. Williams*, 397 U.S. 471 (1970), as dispositive of the threshold question of jurisdiction is misplaced. *Dandridge* involved a challenge to a maximum grant limitation, whereas this case involves a denial of benefits to needy, dependent children on the basis of irrational and invidious discrimination. Moreover, in sharp contrast to *Dandridge* where both Congress and HEW had expressly approved the adoption by states of maximum grants in the allocation of AFDC funds, here both Congress and HEW have unmistakably declared that states, in determining eligiblity for benefits, may only consider income or resources actually available, and may not assume (without proof) as New York does under the challenged regulation, that money expended to meet needs in a prior month remains available to meet subsistence needs during the subsequent period of recoupment. 42 U.S.C. §602(a)(7) and (10); *King v. Smith*, 392 U.S. 309, 319 n. 16. In a brief filed by HEW on behalf of the United States as *Amicus Curiae*, the

agency charged by Congress with the interpretation of the Social Security Act, the recoupment regulation was construed as violative of the federal statute and HEW regulations.[2] For as we have demonstrated in our main brief (See Petitioner's Brief pp. 23-30) the New York regulation fails to pass constitutional muster even under the *Dandridge* standard since it is clearly not rationally based and free from invidious discrimination.

Respondent's broad-sweeping application of *Dandridge* as foreclosing any equal protection challenge in the area of social-welfare legislation disregards the decisions of the

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[2]The State's pronouncement (Respondent's Brief at 7, fn. 8) that the views of HEW are no longer those expressed in its *Amicus* brief is without foundation in fact or law. The flaw in the State's contention that 45 CFR §233.20(a)(12) (added after the repeal of §233.20(a)(3)(ii)(d)) now "sanctions recoupment regardless of the reason" is two-fold. First, the cited regulation by its very terms is limited to "*overpayments*". The State has repeatedly contended that "the advances made to plaintiffs to forestall eviction are not 'overpayments'." (See Respondent's Circuit Court Brief in *Hagans I* at 35). HEW agrees that the emergency rent disbursals are not overpayments but are disbursals made to meet current needs. In its *Amicus* brief, HEW stated "for the purposes of claiming matching federal funds, New York treats these disbursals as correct payments. Federal funds can be utilized only to match payments of assistance, but not payments otherwise characterized, such as loans". See Brief for HEW as *Amicus Curiae* at App. 8 in Petitioner's Brief. Secondly, the provision cited by the Respondent is not the regulation directly involved here. The controlling regulation and the one cited by the district court is 45 CFR §233.20(a)(3)(ii)(c); this regulation continues to remain in full force and effect and requires that states, in determining financial eligibility and the amount of assistance granted, may only consider such net income as is actually available for current use on a regular basis. Thus, New York remains forbidden from creating presumptions of availability of income and the regulation continues to be in contravention of federally imposed requirements.

Court in *Townsend v. Swank*, 404 U.S. 282 (1971), and *Carter v. Stanton*, 404 U.S. 669 (1972).[3] In both *Townsend* and *Carter*, social-welfare legislation was challenged as violative of the Equal Protection Clause of the Fourteenth Amendment and the provisions of the Social Security Act, and notwithstanding the decisions cited by respondent in support of its contention that the constitutional claims are frivolous, the Court upheld federal jurisdiction determining the constitutional claims to be substantial. Significantly, the Court cited *Dandridge* in support of its finding of substantiality. *Townsend, supra*, at 292 (dictum); *Carter, supra*, at 671.

Since the complaint plainly sets forth constitutional claims which have "some foundation of plausibility," *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 130 (1906), are not "absolutely devoid of merit," *Baker v. Carr*, 369 U.S. 186, 189 (1962), and have not been inescapably rendered frivolous by prior authoritative decisions, *Goosby v. Osser*, 409 U.S. 512 (1973), federal jurisdiction was obtained by the district court.

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[3] The case of *Money v. Swank*, 432 F.2d 1140 (7th Cir. 1970), cited by the respondent in support of its argument that the holding of *Dandridge* precludes a finding of jurisdictional substantiality of the equal protection claim, clearly demonstrates the unreliability of such sweeping application. In *Townsend v. Swank*, 404 U.S. 282 (1971), the issues declared frivolous by the *Money* court, were held to be substantial and the Court concluded jurisdiction was not precluded by its earlier decision in *Dandridge*. From a standpoint of judicial economy, it would thus appear that the more appropriate course for lower courts to follow would be to assume jurisdiction and dispose of important questions on their merits.

POINT II

SECTION 1983 PROVIDES A REMEDY FOR THE DEPRIVATION OF RIGHTS SECURED BY THE SOCIAL SECURITY ACT AND IS AN ACT OF CONGRESS PROVIDING FOR EQUAL RIGHTS AND THE PROTECTION OF CIVIL RIGHTS WITHIN THE MEANING OF 28 U.S.C. §§1343(3) AND (4).

A. Section 1983 Provides a Remedy for the Deprivation of Rights Secured by Federal Laws, Including the Social Security Act

Faced with the clear, unambiguous provision in §1983 for a cause of action to redress the deprivation of rights secured by "laws" of the United States, and the incontestable fact that the Social Security Act and §§402(a)(7), (a)(10) in particular, are such "laws",[4] respondent urges the Court to interpret "laws" as applying only to the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §§1971, 1981 and 1982. He reasons that since these statutes as originally enacted contained their own

[4] Respondent, despite the long line of unequivocable decisions of this Court, claims that "it is doubtful" that the Social Security Act secures to petitioners any rights at all. (Respondent's Brief at 34, n.22). He reasons that since a state has an option not to participate in the AFDC program, "Rights are 'secured' to individual recipients only to the extent the states decide to comply with the program." *Ibid.* Surely the teaching of *King v. Smith*, 392 U.S. 309 (1968), *Rosado v. Wyman*, 397 U.S. 397 (1970), *Lewis v. Martin*, 397 U.S. 551 (1970), *Townsend v. Swank*, 404 U.S. 282 (1971), *Carleson v. Remillard*, 406 U.S. 515 (1972), is that so long as the states continue to use federal money in their AFDC programs recipients have the *right* to have those funds distributed in accordance with the conditions set forth by Congress. New York may drop out of the AFDC program, but unless and until it does so, petitioners have a *right* to have their grants computed in accordance with §§402(a)(7), (a)(10) of the Social Security Act.

remedial provisions, when they were later separated out in the codification and revision of 1875 the phrase "and laws" had to be added to §1983 so that actions under §§1971, 1981 and 1982 would continue to be "authorized by law" as required by §1343(3). (Respondent's Brief at 30-31). Having so concluded, respondent argues that only laws enforcing the Thirteenth, Fourteenth and Fifteenth Amendments were intended to be included by the word "laws". (Respondent's Brief at 32).

The obvious flaw to this argument is that had Congress intended in 1875 to limit §1983 to "some" laws, it would have done so. Even assuming the revisor may have thought it necessary to specifically provide for §§1971, 1981 and 1982 remedies through §1983, but cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 414, n. 13 (1968); *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969) (holding that such remedies could be implied from §1982 directly) he and the Congress deliberately used the broader, unrestricted word "laws" to accomplish that purpose, thus going beyond that purported particular immediate concern which may have prompted their action. By using in §1983 the open-ended phrase, "any right . . . secured by the Constitution and laws", Congress authorized a federal remedy to redress deprivation of both existing and future Constitutional and federal statutory rights. Cf. *Georgia v. Rachel*, 384 U.S. 780, 789 (1966).[5]

[5] In *Rachel*, the Court held that when Congress codified the removal provision of what is now 28 U.S.C. §1443 to provide for removal when a person cannot enforce in state court "a right under any law providing for the equal civil rights of citizens. . . .", the language it chose did "not suggest that it intended to limit the scope of removal to rights recognized in statutes existing in 1874. On the contrary, Congress' choice of the open-ended phrase 'any law providing for . . . equal civil rights' was clearly appropriate to permit removal in cases involving 'a right under' both existing and future statutes that provided for equal civil rights." *Id.* at 789.

Respondent points to no evidence which supports his view that "laws" means only the 1866 and 1870 Civil Rights Acts, and as the same law review note upon which respondent relies for his point (Br. 31) concludes, "such a limited interpretation (i.e., "laws" means only the 1866 and 1870 Civil Rights Acts) would be inconsistent with the overall purpose of the 1871 Act as indicated by its legislative history—to provide a remedy for all class deprivations." *Note, Federal Jurisdiction Over Challenges to State Welfare Programs*, 72 Colum. L. Rev. 1404, 1419 (1972).[6] That Congress did not contemplate the post New Deal surge in legislation creating new rights and entitlements for the American people (see Respondent's Brief at 33) is completely beside the point. Congress was surely aware of the likelihood that it would enact future statutes, just as it knew that it had enacted statutes prior to 1866, but it nonetheless failed to restrict the cause of action it had created to those arising from the deprivation of a right secured by any particular law.[7] If Congress is dissatisfied with the breadth of §1983, it may, of course, revise that section, or, in creating new statutory rights it does not want subject to the provisions of that section, provide for such limitation in the particular statute. This, in fact, is precisely what Congress has done. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150, n.5 (1970).

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[6]Of course, as petitioners have argued, it is this very purpose which indicates that §1983 is an "equal rights" statute within the meaning of §1343(3). (See, Petitioners' main Brief at 53-55.)

[7]Indeed, in providing for general federal question jurisdiction the very same year as in which §1983 was codified, Congress again described the grant as pertaining to cases "arising under the Constitution, *laws*, or treaties of the United States." Act of March 3, 1875, 18 Stat. 470, 28 U.S.C. §1331 (emphasis added). "Laws" is the term Congress uses to describe *all* federal statutes.

Respondent also takes comfort from this Court's decision in *Holt v. Indiana Manufacturing Company*, 176 U.S. 68 (1900), arguing that *Holt* construed §1983 as being applicable only to "rights secured by the Fourteenth Amendment," (Respondent's Brief at 32) by virtue of its holding that §1983 applies only to "civil rights". The claims in *Holt*, however, were both statutory *and* constitutional, and thus to the extent any rationale could possibly be found for its decision, it must have been based *not* on the inapplicability of §1983 to statutory rights, but on the fact that only economic rights were involved, a limitation to §1983 which this Court has since rejected in *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972). Indeed, in *Lynch* the Court rejected even this sole rationale for *Holt*, noting that *Holt* "may ... be seen as consistent with congressional restriction of federal jurisdiction in this special class of cases (challenges to the collection of a state tax), and with longstanding judicial policy," 405 U.S. at 542, n.6, not as an authoritative construction of §1343(3).[8]

B. Section 1983 Is an "Act of Congress Providing for Equal Rights...." Within the Meaning of 28 U.S.C. §1343(3).

With respect to the question of the application of §1343(3) to statutory deprivations sought to be redressed under §1983, respondent characterizes petitioners' argument as "purely verbal" with "no basis in the legislative history of section 1983 or section 1343."

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[8] The *Holt* opinion hardly recommends itself as a persuasive interpretation of §1983, prefacing its holding as it did by questioning whether §1983 was still in force. 176 U.S. at 72 ("Assuming (it is) still in force....").

(Respondent's Brief at 40). Quite to the contrary, while petitioners offer no apologies for resorting to the words Congress used to determine their effect, the fact is that what legislative history can be found (see Petitioners' Brief at 53-55) supports the view that the Congress considered §1983 to be an "Act of Congress providing for equal rights. . . ."

Respondent's principle contention seems to be that the "equal rights" language of the present §1343(3) was descriptive only of "the Civil Rights Acts passed pursuant to the enforcement clauses of the Thirteenth, Fourteenth and Fifteenth Amendments." (Respondent's Brief at 37). Precisely! But, §1983, which provides for the redress of statutory as well as constitutional rights, was itself enacted pursuant to the enforcement clause of the Fourteenth Amendment. Respondent, however, relies on the purposes of §1983 as articulated in *Monroe v. Pape*, 365 U.S. 167 (1961), for his conclusion that the Civil Rights Act was designed only "to provide a federal forum for the adjudication of those federal statutory rights that might evoke discriminatory treatment on the part of state courts." (Respondent's Brief at 41). The difficulty with this approach is that in *Monroe* the Court held that the constitutional rights protected included *all* such rights, not only those denied because of racial hostility. (*Monroe* involved an illegal search under the Fourth and Fourteenth Amendments). It seems somewhat incredible that Congress intended to restrict the application of the Act to racial discrimination when statutory rights are at stake, but not to limit its scope in the case of constitutional rights. Surely, considering the lack of logic for such a distinction, such a value judgment would have been expressed more clearly.

Respondent points to one reference in the legislative history, notes on the revisor's draft (Respondent's Brief at 36-37) which purportedly supports his restrictive interpretation of §1343(3), but on closer examination those notes (which are admittedly unclear to say the least) are supportive of petitioner's construction. Perceiving a potential misinterpretation at some future date of the 1866 and 1870 Civil Rights Acts as authorizing federal actions even where the claim in question did not arise from a deprivation of one of the enumerated rights, the revisor speculated that the 1871 Act (predecessor of §1983) which specifically created a cause of action only where the claim arose out of a deprivation of the rights protected therein, may have been intended to include within its coverage the previous rights established by the 1866 and 1870 Acts and so to clear up the ambiguity in the earlier statutes. I Revision of U.S. Statutes, Title 13, p. 64 (1872 draft). The revisor, on the other hand, feared that it might be later held that:

> "only such rights as are specifically secured by the Constitution, and not *every right secured by a law authorized by the Constitution*, were here (predecessor of §1343(3)) intended. . . ." *Ibid.* (emphasis added).

If such proved the case, the phrase "secured by the Constitution" which was used in the original 1871 Act would not have covered the 1866 and 1870 Acts which were, of course, merely laws "authorized by the Constitution". Accordingly, in order to ensure that "every right secured by a law authorized by the Constitution" were covered, the revisor "deemed (it) safer to add a reference to the Civil Rights Act". *Ibid.* He did so by adding the "equal rights" clause here at issue.

Section 1983, which simultaneously was amended to include specific reference to rights secured by federal "laws", is the "Civil Rights Act" to which the revisor referred, and for which he was establishing a jurisdictional base by inserting the term "Act of Congress providing for equal rights". Only such an interpretation could guarantee that "every right secured by law authorized by the Constitution" would be covered. If the reference were only to the 1866 and 1870 Acts, as respondent would have it, only *some* rights would be protected by a grant of federal jurisdiction. Confirmatory of this interpretation is the explicit grant of jurisdiction in the district courts to hear claims to redress the deprivation of rights secured by "any law of the United States," a jurisdictional grant which, if consistent with the original 1871 Act, would have been concurrent with the circuit court's jurisdiction. Indeed, the revisor's belief that the 1871 Act as originally enacted already provided, by virtue of the phrase "secured by the Constitution," redress for deprivation of rights secured by federal statutes which were authorized by the Constitution, coupled with his uncertainty as to judicial acceptance of his construction, probably formed the basis for his explicit reference to "laws" in the 1875 codification. (See Point 2-A, *supra*). Congress' acceptance of that apparent "expansion" of the 1871 Act without comment can be understood best in that context, i.e., the revisor's belief was correct.[9]

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[9] In this regard, petitioners stand by their interpretation of the original 1871 Act as providing protection for federal statutory rights by virtue of the Fourteenth Amendment's privileges and immunities clause. (Petitioners' Brief, at 36, n. 24). Contrary to respondent's characterization of the *Slaughterhouse Cases*, 16 Wall 36 (1872), in those cases the Court rejected only the claim that

Finally, respondent bolsters his argument with a linguistic appeal of his own. He argues that if §1983 is an "equal rights" statute for purposes of §1343(3), then "laws" as used in §1983 must also be so limited and, therefore, deprivations of rights under the Social Security Act are not covered by §1983. This misses the point. Section 1983 is an equal rights statute because it guarantees to all persons the equal opportunity to enforce their federal rights by providing a federal judicial remedy to redress deprivations of those rights whether constitutional or statutory. Section 1983 thus provides for equality before the law regardless of the nature of the underlying substantive right which triggers a §1983 action.

"fundamental rights" were protected by the privileges and immunities clause, but held that the privileges and immununities to be secured from state infringement were those "limited class of interests growing out of the relationship between the citizen and the national government created by the Constitution and *federal laws*." *Hague v. CIO*, 307 U.S. 496, 520, n. 1 (1939) (Stone, concurring) (emphasis added). While even some rights secured by the Constitution would not be covered by the privileges and immunities clause because they were derived from the common law and did not owe their existence to the national government, *Ibid*, new rights and obligations created by federal statutes do wholly owe their existence to the establishment of the federal government. Cf. *United States v. Waddell*, 112 U.S. 76 (1884). Section 1983, then, was enacted in part to enforce the privileges and immunities clause of the Fourteenth Amendment and the phrase, "privileges and immunities secured by the Constitution" used in the original 1871 Act (and still used in §1343(3)) describes federal statutory rights created by the Congress.

C. Section 1983 Is an "Act of Congress Providing for the Protection of Civil Rights. . . ."

It is not entirely clear whether respondent resists §1343(4) jurisdiction in this case on the basis that rights secured by federal statutes (as opposed to the Constitution) are not "civil rights," or that §1343(4), despite its unambiguous terms, does not afford jurisdiction for cases other than voting rights cases, or of some combination of these arguments.[10] In any event, these arguments miss the mark.

There can be no serious doubt that rights created by statute, capable of being enforced in a civil action at the behest of a person aggrieved by nonenforcement, are "civil rights". (See, Petitioners' Brief, at 37-39). Such rights are precisely those which the 1866, 1870 and 1871 Civil Rights Acts were designed to protect by creating new federal civil and criminal remedies for state deprivations of federal statutory, as well as constitutional rights. In addition to §1983, see, for example, 18 U.S.C. §§241, 242, the criminal civil rights statutes which impose their penalties for interference with federal statutory rights.

Respondent's view (Respondent's Brief at 42) that an interpretation of §1983 which includes the protection of statutory rights renders 28 U.S.C. §1331 meaningless, ignores the plain fact that §1983 applies only in cases of state action. Hence, §1343(4), *when used with §1983,* would similarly require action under color of state law, leaving to §1331 and its jurisdictional amount requirement other federal question cases in which there is no

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[10]Respondent does not appear to dispute the obvious that §1983 is an "Act of Congress providing for the protection of civil rights. . . ." See, *Moor v. County of Alameda,* 93 S.Ct. 1785, 1792, n. 13.

state action. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 546 (1972). Indeed, since §1331 includes not only cases arising under the "laws", but those arising under the "Constitution" as well, and since concededly *all* constitutional rights are protected by §1983, respondent's argument, if accepted, would have §1983 read out of existence in order to avoid overlap with §1331.

Respondent urges, however, that the House Report's reference to the "technical" nature of §1343(4) robs it of the meaning its plain language would naturally give to it. Our main brief shows why the description as "technical" is an unreliable interpretation of Congress' action. (See Petitioner's Brief at 42-47).[11] Respondent offers nothing in response, preferring instead to stand on the assertion of technicality without even acknowledging that even a technical provision must have *some* meaning. Respondent offers us none however, for the specific reference in §1343(4) to statutes protecting "civil rights". Indeed, respondent's reliance on the House Report is undercut by his own admission that §1343(4) was drawn so as not to require state action (Respondent's Brief at 52), necessarily an admission of the importance of §1343(4) as a new jurisdictional grant to the federal courts, and an acknowledgement that the "technical" amendment does indeed extend federal court power in a monumental way.

Required to find some meaning for §1343(4), respondent suggests it is restricted to voting rights cases.

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[11]Petitioners showed that the "preceding section" to which §1343(4) was alleged to conform was not enacted, that statutory jurisdiction already existed over the type of action which that section would have authorized, and that a specific jurisdictional grant dealing with that section was elsewhere included in the bill.

While concern with voting rights was indeed paramount, Congress provided for federal court jurisdiction over claims under statutes "protecting civil rights, including the right to vote," *not* just to statutes "protecting the right to vote". Moreover, apart from the plain language of the provision stands the fact that the proponent of the "compromise" leaving §1343(4) intact, himself told the Senate "(t)here is a definite difference between the right to vote and other civil rights". 103 Cong. Rec. 12560 (1957). While this remark came in the context of a speech urging the importance of voting rights, and the Case "compromise", it underscores the awareness of the Congress of its choice of sweeping language in §1343(4).

The Court should have no difficulty enforcing the clear language of §1343(4) merely because it was inserted and advanced in the Congress without great fanfare as to its importance to non-voting rights cases. The legislative process, and its give and take, do not always leave us with the precise instructions we might prefer. Given the prevalent assumption during the debate that *individuals* already had the power, now proposed for the Attorney General, to go to federal court to obtain injunctions against the denial of all of their civil rights, see, e.g., 103 Cong. Rec. 12080, 12083, 12097, 12558, it is a plausible explanation for the abstruse debate on §1343(4) that many Congressmen believed that claims such as the one in this case could already be brought in district court. As Sen. Case noted, §1343(4) would "clarify the jurisdiction of the district court in the entertainment of suits . . . under any act of Congress providing for the protection of civil rights, including the right to vote." 103 Cong. Rec. 12559 (1957). Those assumptions were, in our view, correct, see our arguments on §1343(3), but in any case

the Court cannot fail to enforce Congressional efforts to clear up the ambiguity with a clear statutory provision.

Finally, respondent purports to have found explicit evidence that Congress did not intend suits such as the one at bar to come within §1343(4), despite its unequivocable language. He relies principally on statements by Senators Aiken and Javits (Respondent's Brief at 49, 50) which he says indicate that §1343(4) "has nothing to do with social security". (Respondent's Brief at 52). Our reading of these statements, and the context in which they were made, persuades us that they had no relevance whatsoever to §1343(4), and were applicable only to the rest of Part III of the bill. A brief review of the debates is in order.

As noted in both main briefs, Part III of H.R. 6127, as passed by the House, included two sections. Section 121 added two new paragraphs to 42 U.S.C. §1985 which authorized the Attorney General to commence civil actions to prevent the deprivation of rights protected by that statute. Section 122 added §1343(4). Except for a few specific references to §122, the entire debate on Part III focused on the new powers it would give the Attorney General. Arguments were made that it would deprive defendants of the right to jury trial, e.g., 103 Cong. Rec. 12087-89 (1957), that it would violate the important principle of "home rule" and weaken the authority of and respect for state and local officials, e.g., *id.* at 12283, 12541, and in sum, that it would potentially lead to abuse of power by a future Attorney General, e.g., *id.* at 11981.

Proponents of §121 emphasized that it created no new rights but merely established additional remedies for enforcement of existing rights. *Id.* at 12081, 12545. It was emphasized that the Federal Government (i.e., the

Executive) already exercised criminal power in these areas. E.g. *id.* at 12090. Statements such as those by Sen. Neuberger that "part III . . . does not add any substantive law or extend federal jurisdiction in the field of civil rights," *id.* at 12545, may thus be seen as referring to the proposed grant of power to the Attorney General to file civil suits in cases over which he already had criminal jurisdiction, *not* to the subject matter jurisdiction of United States Courts which, of course, is precisely what §1343(4) relates to. Indeed, during this entire debate reference was made loosely to "Part III," *not* specifically to §121, which, because of the Attorney General's proposed powers, was the cause for Congressional concern over Part III.

Thus, even *after* Senator Case offered his amendment to retain §122 and strike only §121 (*id.* at 11980), making that the pending business, the debate continued to focus on "Part III," the short-hand description of §121, e.g., *id.* at 11981 (Aiken, Lausche). It is in that context that Sen. Aiken expressed fear that "Part III" could go into the matter of social security, and that it might result in the Federal Government undertaking to force uniform State laws so far as social security and unemployment payments were concerned." *Ibid.* That fear, and Sen. Javits' rejoinder that "Part III (will not) lead the Federal Government into all the fields enumerated," *id.* at 12077, relates *not* to §122 (and §1343(4)), but to §121 and the Attorney General authorization. As Sen. Javits noted, "*the United States* has many other powers in respect to the wages and hours law and in respect to other Federal statutes, and it does not need this law for that purpose (i.e. to intrude into the areas described by Sen. Aiken)." *Id.* at 12077 (emphasis added).

Of course, Sen. Javits' view that §121 would not lead the Executive into the areas set forth by Sen. Aiken was correct since §1985, to which §121 would add the new grant of power, applies only to specific substantive rights, namely, the right to hold public office, 42 U.S.C. §1985(1), the right to give testimony, 42 U.S.C. §1985(2), and the right to equal protection of the laws, 42 U.S.C. §1985(3). General protection is not given under §1985 for *all* civil rights such as is afforded by §1983, and the new proposed power of the Attorney General indeed would not therefore extend Executive action to any federal statutory rights, including social security and unemployment compensation. These exchanges do not support the contention that the Senate feared and debated petitioners' construction of §1343(4). The Court should enforce §1343(4) as it reads, and as it was intended to read.

CONCLUSION

THE COURT SHOULD HOLD THAT THE DISTRICT COURT HAD JURISDICTION TO DETERMINE THE MERIT OF PETITIONERS' CLAIMS. THE JUDGMENT OF THE COURT BELOW SHOULD BE REVERSED AND THE CASE REMANDED WITH APPROPRIATE DIRECTIONS.

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